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No. 539

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ATCHISON, TOPEKA AND SANTA FE, ET AL.

Intervening Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division.

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, the intervening railroad appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. App. A at pages App. 1-9) dis-

missing a suit to set aside an order of the Interstate Commerce Commission (*Cancellation of Private Car Allowances on B&OCT and IHB*, 322 I.C.C. 565) which required two appellants, Indiana Harbor Belt Railroad Company (IHB) and Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT), to restore tariffs authorizing the payment of "mileage allowances" to shippers providing cars used by the railroads in transporting these shippers' goods.

All appellants are railroad carriers subject to Part I of the Interstate Commerce Act, which imposes upon each of them a statutory duty to furnish cars to transport traffic offered to it by a shipper. 49 U.S.C. 1(3), 1(4), 1(10) *et seq.* *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428. Where a railroad uses a car belonging to a shipper, it is required by Section 15(13) of the Act to compensate the shipper for the use of his car by paying him a "mileage allowance."[1] Early in the administration of the Act it was established that this obligation of all railroads applied explicitly to switching railroads, such as appellants IHB and B&OCT, in *Paragon Refining Company* v. *Alton & Southern R.R.*, 118 I.C.C. 166. The Commission there held (id. at 168) that:

> "The obligation is on the switching line to pay the allowance unless the line-haul carrier assumes it, which has not been done here . . . . We find that defendant's failure and refusal to provide by tariff publication for

[1] Section 15(13) of the Interstate Commerce Act, 49 U.S.C. 15 (13), provides in pertinent part:

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable."

the payment of a mileage allowance on private tank cars moving in service over its lines the same as paid by the line-haul carriers is and has been an unreasonable practice."

Accordingly, until they published the tariffs here in controversy (filed to become effective July 1, 1963, but suspended by the Commission[2]), these appellants had long maintained tariffs providing for payment of mileage allowances on shipper-owned cars. Their attempt, in the subject tariffs, to cancel these mileage allowances the Commission found unlawful, in violation of Section 1(6) and 15(7) of the Act (J.S. App. B at page 21).

The Commission's findings that this practice would deny to shippers payments to which they are entitled by statute (J.S. App. B at pages 20 and 21) are unequivocal. On Section 1(6) it found that:

" . . . on many of the mileage allowance cars (some 63 per cent from the best evidence available (Table III))[3] no allowances would be paid."

"The proposal, insofar as it would result in the mileage allowance payments to car owners, would, in many instances, require the owners to accept lesser compensation for furnished facilities which the respondents [appellants here] are obligated to furnish."

Finally, on Section 15(7), after analyzing appellants' attempts to justify these tariffs, it found (J.S. App. B at page 21) "that the proposed schedules are not shown to be just and reasonable."

These findings the district court explicitly affirmed (J.S. App. A at pages 6 and 7), holding:

"This court is of the opinion that the shippers are

[2] J.S. App. A. at pages 11-12.

[3] Footnote 7 is interpolated into the text here.

> sufficiently interested in receiving their rent promptly to justify the Commission in deciding that Section 1(6) covered this case. The resolution of the controversy does affect shippers."

and

> "Section 15(7) of the I.C.C. Act (49 USC 15(7)) places the burden of proof on the carrier in a rate proceeding, or in a proceeding in the nature of a rate proceeding, to justify a proposed schedule as just and reasonable. This court is satisfied that the petitioners introduced no persuasive evidence and that the Commission's findings that there was no showing that the proposed schedules were just and reasonable is fully justified."

and summarizing (*id.* at page 9):

> "In summary, it is the opinion of the court that the Commission did not err in applying Section 1(6) under the circumstances present in this case; and on the question of fact the record justified the finding that petitioners had not shouldered their burden to show the tariffs are just and reasonable."

It is but one of these findings which appellants would relitigate for a third time, arguing only (J.S. page 3) that Section 1(6) was improperly applied "in the circumstances of this case which is a controversy between railroads[.]" The holding on Section 15(7), which we contend is itself sufficient to sustain both the Commission holding and that of the district court below, is not challenged here.

ARGUMENT

The decision of the district court should be summarily affirmed, we submit, because:

1) Appellants' sole question here is grounded on the factual premise that their action affected only other

railroads, and not shipper owners of mileage cars, a premise contrary to consecutive findings of fact by both the Commission and the reviewing court below (which findings are set out in full in the Statement, above at pages 3-4); and

2) a decision for appellants upon this single question presented would still require affirmance of the court below on an unappealed ground which is itself sufficient to sustain the judgment.

1. THE DECISIONS OF THIS COURT ARE WELL SETTLED; IT DOES NOT SIT TO REVIEW CONSECUTIVE FINDINGS OF FACT.

The rule that this Court does not sit to review consecutive findings of fact was established early. *Baker* v. *Schofield*, 243 U.S. 114 at 118; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. In a brace of cases[4] following enactment of the Administrative Procedure Act[5] and establishing the responsibilities of federal courts in administrative review cases, this Court held in *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U.S. 498 at 503:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation

[4] *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474; *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498.

[5] 5 U.S.C. 551 *et seq.*

of circumstances which admit of different interpretations.' *Federal Trade Comm'n.* v. *American Tobacco Co.*, 274 U.S. 543, 544."

Again, in *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, the Court took pains to explain (*id.* at 400-401) that this rule was not restricted to the labor statutes, holding that:

> "'we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Moreover, in *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951), we decided that substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.'"

This practice has been described by the Court as a "settled policy of appellate review" in *Communist Party* v. *Control Board*, 367 U.S. 1 at 69, a policy precluding appellants from questioning now (J.S. at page 3) whether there was in fact a substantial basis for the repeated findings (set out in the Statement at pages 3-4 above) by the Commission and the reviewing court below that these carriers' conduct affected obligations owing to the shipping public dependent upon their services. Summary affirmance could hardly be better justified, we submit. See *Per Curiam Practice*, 69 Harv. L. Rev. 707 at 714 (1956).

2. EVEN IF APPELLANTS' QUESTION WERE RESOLVED AS THEY CONTEND, THE DECISION BELOW WOULD REQUIRE AFFIRMANCE UPON A SEPARATE GROUND WHICH APPELLANTS HAVE NOT ATTEMPTED TO APPEAL.

Under Section 15(7) of the Act, 49 U.S.C. 15(7)[6], appellants had the burden of proving that the tariffs cancelling these mileage allowances were just and reasonable. At the I.C.C. hearing only appellant IHB attempted to justify the cancellation. The Commission concluded that appellants had not sustained their burden of proof under 15(7):

> "We find that the proposed schedules are not shown to be just and reasonable." J.S., App. B at page 21.

So, too, the three-judge court on review held that:

> ". . . on the question of fact the record justified the finding that petitioners had not shouldered their burden to show the tariffs are just and reasonable." J.S., App. A at p. 9

Appellants have not preserved any question on this independent ground, which is itself sufficient to sustain both the Commission and the lower court. Instead, their Jurisdictional Statement at page 3 limits this appeal to:

> "Did the Interstate Commerce Commission err in applying Section 1(6) of the Interstate Commerce Act, which regulates only relationships between railroad and shippers, in the circumstances of this case which is a controversy between railroads?"

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[6] Section 15(7) provides in part:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, . . . the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable . . . ."

Thus, even if appellants prevailed upon their argument on this limited question, the Court would still be required to affirm the decision upon this unappealed independent ground of the Section 15(7) findings.

The question of burden of proof under 15(7), of course, is distinctly different from the question presented under Section 1(6) by appellants, and may not be deemed to be "fairly comprised" within the 1(6) question on appeal under Rule 15(c)(1). Failure to raise the 15(7) question precludes consideration of it by this Court. *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 357 n.2; *Irvine* v. *California*, 347 U.S. 128, 129; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-178.

Moreover, appellants never raised the burden of proof issue under 15(7) before the three-judge court, confining their challenge below solely to the factual issue under Section 1(6). In the lower court appellees briefed the 15(7) point as a conclusive defense of the Commission's order, resulting in the holding on this point. Since the 15(7) contention was waived by appellants below, they cannot now raise this issue. *Tyrell* v. *District of Columbia*, 243 U.S. 1; *California* v. *Taylor*, 353 U.S. 553, 557 n.2; *Lawn* v. *United States*, 355 U.S. 362, n.16.

The 15(7) issue is dispositive of the case. Since appellants are precluded from raising the issue, they cannot prevail upon appeal. Plenary argument of the case is thus unwarranted.

CONCLUSION.

For the reasons stated, we respectfully submit that the question appellants would present is foreclosed from plenary review, and that summary affirmance would be the most appropriate disposition of this appeal.

Respectfully submitted,

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